MOTION FILED
JAN 24 1985

No. 84-1010

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LYDIA B. CHAMPION, *et alia*,
Petitioners,

v.

GEORGE DEUKMEJIAN, *et alia*,
Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

---

MOTION OF PUBLIC SERVICE RESEARCH COUNCIL FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

and

BRIEF *AMICUS CURIAE*

EDWIN VIEIRA, JR.
13877 Napa Drive
Manassas, Virginia 22110
(703) 791-6780

Counsel of Record for Amicus Curiae
Public Service Research Council

24 January 1985

FANNON PRINTING CENTER, ALEXANDRIA, VIRGINIA 22301 (703) 683-5600

21/28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1010

LYDIA B. CHAMPION, *et alia*,
Petitioners,

v.

GEORGE DEUKMEJIAN, *et alia*,
Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

---

MOTION OF PUBLIC SERVICE RESEARCH COUNCIL FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

INTRODUCTION

Pursuant to Rule 36.1 of the Rules of this Court, Public Service Research Council hereby moves for leave to file the attached brief *amicus curiae* in support of the petition for certiorari. Respondent California State Employees Association has refused to consent to such filing.

INTEREST OF THE *AMICUS CURIAE*

Public Service Research Council is an independent national association of some 900,000 scholars, com-

mentators, legislators, and private citizens from all walks of life united by a common concern for the maintenance of effective constitutional government. The Council engages in non-partisan research and education regarding, among other things, the character and operation of collective bargaining in public employment, and its effects on governmental institutions and the provision of public services at the local, state, and national levels.

The Council has developed considerable expertise concerning the philosophical, political, social, legal, economic, and practical aspects of public-sector unionism and collective bargaining.[1] On numerous occasions, it has provided this and other Courts with its views in briefs *amicus curiae*.[2]

In the instant case, the Council believes that the parties may not fully present to the Court what the

---

[1] For example, the Council's sister-organization, the Public Service Research Foundation, regularly publishes scholarly articles on these subjects in the *Government Union Review: A Quarterly Journal on Public Sector Labor Relations*.

[2] *E.g.*, Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Rel'ns Authority, No. 82-799 (U.S. Sup. Ct.); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, No. 81-896 (U.S. Sup. Ct.); PATCO v. United States, No. 81-542 (U.S. Sup. Ct.); Jackson Transit Authority v. Local Division 1285, Transit Union, No. 81-411 (U.S. Sup. Ct.); City of Madison, Joint School Dist. No. 8 v. WERC, No. 75-946 (U.S. Sup. Ct.); National League of Cities v. Usery, No. 74-878 (U.S. Sup. Ct.); Virginia v. Arlington County Bd. of Supervisors, No. 18747 (Va. Ct. App.); Pacific Legal Foundation v. Brown, 3 Civil No. 18364 (Cal. Ct. App.); United States v. PATCO, Civil Action No. 81-1805 (D.D.C.); United States v. PATCO, Civil Action No. 81-0763A (E.D. Va.); Air Transport Ass'n of America v. PATCO, No. 70-C-400 (E.D.N.Y.).

Council sees as the central issue informing the decision to issue a writ of certiorari at this stage of the litigation: namely, that denial of the petition will indicate to the country as a whole, and especially to self-interested public-sector unions and their politically motivated allies in state and local governments,

(i) that this Court's pronouncements in *Abood* v. *Detroit Board of Education*[3] and *Ellis* v. *BRAC*[4] on behalf of the constitutional rights of non-union employees are lofty, but ultimately empty platitudes;

(ii) that this Court's manifest disinterest in effectively enforcing *Abood* and *Ellis* licenses the unions and their partisans in official positions to ride roughshod over employees' fundamental liberties, immune in practice from judicial scrutiny and reproof; and

(iii) that therefore this Court lacks credibility as the guardian of constitutional rights, not only where public-sector unions are involved, but also where any private special-interest group is politically powerful enough to overawe legislators into enacting its illegitimate goals into law, and to connive with inferior courts to misinterpret and misapply this Court's decisions so as to whitewash what is really going on.

---

[3] 431 U.S. 209 (1977).

[4] —— U.S. ——, 104 S. Ct. 1883 (1984).

CONCLUSION

Wherefore, the Council prays that this Court grant its motion for leave to file the attached brief *amicus curiae.*

Respectfully submitted,

EDWIN VIEIRA, JR.
13877 Napa Drive
Manassas, Virginia 22110
(703) 791-6780

Counsel of Record for Amicus Curiae
Public Service Research Council

24 January 1985

No. 84-1010

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LYDIA B. CHAMPION, *et alia*,
Petitioners,

v.

GEORGE DEUKMEJIAN, *et alia*,
Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

---

BRIEF *AMICUS CURIAE* OF PUBLIC SERVICE RESEARCH COUNCIL IN SUPPORT OF THE PETITION FOR CERTIORARI

EDWIN VIEIRA, JR.
13877 Napa Drive
Manassas, Virginia 22110
(703) 791-6780

Counsel of Record for Amicus Curiae
Public Service Research Council

24 January 1985

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

INTEREST OF THE *Amicus Curiae* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 2

I. Because of the unprecedented but undeniable substantive and procedural invalidity of California's fair-share-fee scheme, *Abood* and *Ellis* compel entry of preliminary injunctive relief 2

II. Not to enforce *Abood* and *Ellis* in this case will draw into question both this Court's willingness to police revisionism by the inferior federal courts, and its own commitment to the constitutional principles those decisions enunciated 8

CONCLUSION 11

CERTIFICATE OF SERVICE 12

TABLE OF AUTHORITIES

Cases

Page

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) ..... *passim*

BRAC v. Allen, 373 U.S. 113 (1963) 4

Champion v. California, 738 F.2d 1082 (9th Cir. 1984) .4, 6, 8

Ellis v. BRAC, — U.S. —, 104 S. Ct. 1883 (1984) *passim*

Hudson v. Local No. 1, Chicago Teachers Union, 743 F.2d 1187 (7th Cir. 1984) 7

IAM v. Street, 367 U.S. 740 (1961) 4

Robinson v. New Jersey, 741 F.2d 598 (3d Cir. 1984) .. 7

Statute and Rule

California Government Code § 3515.8 ..... 3, 5

Rule 36.1 of the Rules of the Supreme Court of the United States 1

Miscellaneous

J. Locke, *An Essay Concerning the True Original, Extent, and End of Civil Government,* (P. Laslett ed. 1960) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1010

LYDIA B. CHAMPION, *et alia*,
Petitioners,

v.

GEORGE DEUKMEJIAN, *et alia*,
Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

---

BRIEF *AMICUS CURIAE* OF PUBLIC SERVICE RESEARCH COUNCIL IN SUPPORT OF THE PETITION FOR CERTIORARI

INTRODUCTION

Pursuant to Rule 36.1 of the Rules of this Court, Public Service Research Council submits this brief *amicus curiae* in support of the petition for certiorari.

INTEREST OF THE *AMICUS CURIAE*

The Council has set forth its interest in this case in its motion attached hereto, under the heading "INTEREST OF THE *Amicus Curiae*", and respectfully refers the Court thereto.

SUMMARY OF THE ARGUMENT

A writ of certiorari is warranted here because the decision of the Court of Appeals for the Ninth Circuit flies in the face of this Court's decisions in *Abood* v. *Detroit Board of Education*[1] and *Ellis* v. *BRAC*.[2] Moreover, the disparity between the Court of Appeals' opinion and this Court's contrary opinions in *Abood* and *Ellis* is so obvious, great, unjustifiable, and pregnant with serious consequences for the administration of the federal judicial system, as well as for the constitutional liberties of non-union public employees, that for this Court to deny a writ would be to call into question either its own willingness to police the inferior federal courts, or its own continuing commitment to the fundamental principles of *Abood* and *Ellis*.

ARGUMENT

I. Because of the unprecedented but undeniable substantive and procedural invalidity of California's fair-share-fee scheme, *Abood* and *Ellis* compel entry of preliminary injunctive relief.

On its face, California's fair-share-fee scheme is an unprecedented, but undeniable affront to the principles this Court enunciated in *Abood* and *Ellis* concerning the substantive and procedural limitations that the Constitution imposes on such arrangements in both public and private employment.

A. Substantively, the statute licenses a public-employee union to collect, retain, and spend dissenting employees' fair-share fees "in aid of activities or

---

[1] 431 U.S. 209 (1977).

[2] —— U.S ——, 104 S. Ct. 1883 (1984).

causes of a partisan political or ideological nature" that are more than "only incidentally related to the terms and conditions of employment", and for the "support of lobbying activities designed * * * to secure for the employees represented [by the union] advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and conferring with the state employer".[3] Thus, the statute explicitly allows forced subsidization of "lobbying activities" that are directed to matters *outside of* ("in addition to") collective bargaining, and of "activities or causes of a partisan political or ideological nature" that have *no connexion at all* to such bargaining, other than a gossamer-thin more-than-"incidental" relation to its subject matter.

Abood, however, squarely held that a public-employee union may compel dissenters to subsidize its "lobbying activities" only to the extent that those activities constitute an integral and necessary part of the collective-bargaining process itself.[4] And *Abood* squarely held that *no* union expenditures for "political or ideological"—let alone "*partisan* political or ideological"—activities or causes are chargeable to dissenters at all.[5] Under *Abood,* therefore, California's fair-share-fee scheme is unconstitutional on its face, at least to the extent that it licenses (as it does) public-employee unions even to collect—let alone to spend—compulsory payments for non-collective-bargaining "lobbying activities" and for any "activities

---

[3] Cal. Gov't Code § 3515.8.

[4] 431 U.S. at 236.

[5] *Id.* at 235-36.

or causes of a partisan political or ideological nature". And, for that reason, simply perforce of *Abood* petitioners are immediately entitled both to a permanent and *a fortiori* to a preliminary injunction against enforcement of the statute to the extent of its obvious unconstitutionality.

The Court of Appeals' attempt to avoid this result on the supposed authority of *IAM* v. *Street*[6] and *BRAC* v. *Allen*[7] is feckless.[8] For *Street* and *Allen* denied injunctive relief in the context of an "union-security" scheme that this Court not only held constitutional on its face but also construed to prohibit the very types of union political and lobbying expenditures of dissenters' monies that California's statute explicitly allows here.[9] Yet, under the Court of Appeals' aberrant view of those decisions, the substantive protection *Abood* provides for dissenting public employees evaporates. For, even if California had baldly stated that, subject to a later (invalid) "rebate",[10] public-employee unions could collect and spend fair-share fees "for purposes unconstitutional under *Abood*", according to the Court of Appeals no preliminary injunctive relief would be appropriate—notwithstanding that, without such relief, these concededly unconstitutional collections and expenditures

---

[6] 367 U.S. 740 (1961).

[7] 373 U.S. 113 (1963).

[8] *See* Champion v. California, 738 F.2d 1082, 1084-85 (9th Cir. 1984).

[9] *See* Street, 367 U.S. at 768-69 (political causes and activities), 769 n.17 (lobbying).

[10] *See post*, Part I.B.

would *irreparably* injure dissenters' interests in freedom of speech, association, and belief. Here, of course, California has not admitted in so many words that its fair-share-fee scheme offends *Abood*. But no one who reads *Abood* intelligently can conclude other than that it does. So, if the Court of Appeals' decision is allowed to stand, this Court's inaction will effectively hallow the grotesquely *anti*-constitutional premiss of that decision: to wit, that state legislatures may enact, and the inferior federal courts may at least temporarily enforce, substantively unconstitutional statutes for the special benefit of public-employee unions.

B. Procedurally, California's fair-share-fee statute licenses a public-employee union to collect and spend unconstitutional fees subject to dissenting employees' "right to demand and receive from [the union], under procedures established by the [union], a return of" the invalid "part" of those fees.[11] The State's only involvement in the entire procedure (other than as a compliant bag-man for the initial extraction of the fees) is to empower its Public Employment Relations Board to "compel [a union] to return that portion of a fair share fee which the board may determine to be subject to refund under the provisions of this section" [12]—that is, to authorize the Board to require the union to abide by the latter's own "procedures" for fair-share refunds. Thus, on its face, California's fair-share-fee scheme is a pure union-dominated "rebate" system, one that permits a union to collect, to spend, and (unless an employee "demand[s]") to

---

[11] Cal. Gov't Code § 3515.8.

[12] Cal. Gov't Code § 3515.8.

retain permanently monies to which the Constitution, as applied in *Abood,* denies it any mere possessory right in the first instance, let alone an ultimate entitlement.

Ellis, however, squarely held that such an union-controlled "rebate" system, amounting to "an involuntary loan" from dissenting employees, is procedurally improper.[13] Under *Ellis,* therefore, California's fair-share-fee scheme is invalid on its face, at least to the extent that it licenses (as it does) public-employee unions even to collect—let alone to spend and to require dissenting employees to "demand" return of—compulsory payments for non-collective-bargaining "lobbying activities" and for any "activities or causes of a partisan political or ideological nature". And, for that reason, simply perforce of *Ellis* petitioners are immediately entitled both to a permanent and *a fortiori* to a preliminary injunction against enforcement of a statute to the extent of its obvious unconstitutionality.

The Court of Appeals' attempt to avoid this result by "distinguishing" *Ellis* is palpably disingenuous. "*Ellis*", it held, "was decided on a fully developed record and controls only the remedy after a final judgment on the merits."[14] What the Court of Appeals did not acknowledge, though, is that *Ellis* involved an "union-security" statute that this Court had already held to be constitutional on its face, and had construed to prohibit the very types of union expenditures of dissenters' monies for lobbying and

---

[13] —— U.S. at ——, 104 S. Ct. at 1889-90.

[14] 738 F.2d at 1086.

politics that California's statute explicitly allows here.[15] *Ellis* "was decided on a fully developed record" because the dissenting employees there first had to prove that the union was misusing a valid statute; whereas, here the statute in issue bespeaks its invalidity on its face, requiring no record more "fully developed" than judicial notice of the statute's own terms, in the light of an honest reading of *Abood* and *Ellis*.

In the Seventh Circuit, at least, the Court of Appeals' strange notions of procedural due process will find no adherents.[16] But elsewhere,[17] absent decisive intervention by this Court, the Court of Appeals' decision will encourage those intent on evading or eviscerating the procedural protections *Ellis* established, and indeed will reward them by sanctioning pure (albeit illegal) union-controlled "rebate" schemes —and the irreparable injury they cause—for as long as the wrong-doers can hold off a final judgment against themselves.

In sum, this Court should grant the petition because the Court of Appeals' decision flies in the face of *Abood* and *Ellis*.

---

[15] *See ante*, note 9.

[16] Hudson v. Local No. 1, Chicago Teachers Union, 743 F.2d 1187 (7th Cir. 1984). Revealingly, the Court of Appeals completely neglected to analyze California's fair-share-fee scheme according to this Court's controlling procedural-due-process precedents, although petitioners strongly relied on due-process arguments at every stage of the litigation below.

[17] Particularly in the Third Circuit. *See* Robinson v. New Jersey, 741 F.2d 598 (3d Cir. 1984), *petition for writ of certiorari pending*, No. 84-920 (U.S., filed 10 December 1984).

II. Not to enforce *Abood* and *Ellis* in this case will draw into question both this Court's willingness to police revisionism by the inferior federal courts, and its own commitment to the constitutional principles those decisions enunciated.

The stark obviousness of the legal demerits of the Court of Appeals' opinion, combined with the almost nationwide enactment of or agitation for public-employment fair-share-fee statutes not unlike California's, highlights the serious practical harm that denial of the petition would work here and hereafter.

A. No great cynicism is required to appreciate that the self-interested public-employee unions which lobbied for, and the politically venal legislature which enacted, California's fair-share-fee statute were little influenced by the substantive constitutional teaching of *Abood*, and (as respondents' defense of this case in the lower courts evidences) today think as little of the procedural teaching of *Ellis*. But no greater cynicism is necessary to extrapolate from the Court of Appeals' tortuous opinion that court's own thorough disrespect for *Abood* and *Ellis*, and its demonstrated intent *sua sponte* to "revise"—or at least "distinguish" away—the constitutional principles of those decisions, in keeping with its own peculiar (nay, perverse) ideas of what constitutes good "policy" in the field of public-employee unionism and collective bargaining.[18]

For this Court to tolerate, or even blink, such unabashed revisionism by an inferior federal court, especially where fundamental constitutional freedoms

---

[18] *See* 738 F.2d at 1086, opining how "[t]he importance of legislation * * * requires" that unions "be given broad authority" to lobby with dissenters' monies.

are involved, will signal every self-styled activist on the federal bench that, if judicial anarchy is not the order of the day, at least judicial discipline is not immediately forthcoming against those who fancy themselves capable of deciding when, *or when not,* to enforce the clear mandates of this Court's decisions. If the Court of Appeals in this case can blatently declare constitutional, and deny relief against enforcement of, a statute explicitly framed in terms that unequivocally contravene both *Abood* and *Ellis* (not to mention the whole panoply of this Court's strictly procedural-due-process decisions), and then observes this Court meekly looking the other way, what else will it or any other inferior federal court (or any state court, for that matter), learn from that experience save the revolutionary lesson that defiance of this Court's rulings is not only possible, but also easy and costless?! If the Court of Appeals can state without immediate reproof that *Abood* and *Ellis* do not apply to California's fair-share-fee statute, when any thinking person can and does see the opposite on inspection, what new and further enormities will its escape from this Court's supervision stimulate it, and other inferior federal courts, to perpetrate in future cases?

But these questions answer themselves. If the Court of Appeals can succeed in rendering *Abood* and *Ellis* impotent in this case on the flimsy basis stated in its opinion, then (as the songwriter penned) in the inferior federal courts "anything goes". And this Court's opinions become precedents for itself alone.

B. Of course, the inferior federal courts, the bar, and the public could draw another inference from

denial of a writ of certiorari in this egregious case, albeit one even less flattering than that this Court is unwilling (or unable) to police the inferior federal courts when they run amok as has the Court of Appeals. An observer could conclude from this Court's inaction here that its commitment to the constitutional principles of *Abood* and *Ellis* is merely rhetorical. Indeed, for this Court so soon after deciding *Ellis* to tolerate a Court of Appeals' opinion that arrogantly defies and sets at naught that decision in a situation that compels its rigorous enforcement would evidence to anyone paying attention an insouciance for the effective protection of constitutional freedoms that logically implies an equivalent disregard for the freedoms themselves.

"What", the bar and the public would be entitled to ask were a writ denied here, "do *Abood* and *Ellis* really import, if this Court is unwilling to enforce them?" That, perhaps, this Court recognizes that no American of good will would tolerate a decision openly licensing unions to impose themselves as the political overlords of dissenting employees; that, therefore, *Abood* and *Ellis* were necessary *statements* of a principle so deeply rooted in this country's notions of fair play and individual liberty as to be undeniable by any court; but that, for reasons known to this Court alone, *Abood* and *Ellis* must remain *only* statements, so that public-employee unions can continue to enjoy abusive special privileges in fulfillment of some "policy"-judgment that the Court is embarassed to disclose to the public?

Of course, the Council hopes that no American would ever have cause to impute such dark and

devious motives to this, or any other, Court of the United States. Yet, words are one thing, and actions another.[19] And, whereas the words of *Abood* and *Ellis* refulgently promise substantive and procedural protections to non-union public employees, the actions of the Court of Appeals disdainfully prove that those promises are empty—*unless this Court intervenes now.*

In sum, considerations of its own position as supreme interpreter of the Constitution and of its integrity as ultimate protector of the liberties the Constitution guarantees compel this Court to grant the petition.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

EDWIN VIEIRA, JR.
13877 Napa Drive
Manassas, Virginia 22110
(703) 791-6780

Counsel of Record for Amicus Curiae
Public Service Research Council

24 January 1985

---

[19] *See* J. Locke, *An Essay Concerning the True Original, Extent, and End of Civil Government* (P. Laslett ed. 1960), § 20.

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Rule 28 of the Rules of this Court, I have served three (3) copies of the attached MOTION OF PUBLIC SERVICE RESEARCH COUNCIL FOR LEAVE TO FILE BRIEF *Amicus Curiae* IN SUPPORT OF THE PETITION FOR CERTIORARI *and* BRIEF *Amicus Curiae* on each of the following persons, by depositing said copies in a United States post office, first-class postage prepaid, addressed as indicated below:

Thomas Scherrer, Deputy Attorney General
State of California
Office of Attorney General
3580 Wilshire Boulevard, 8th Floor
Los Angeles, California 90010

Raymond C. Fisher
Wayne Stephen Braveman
Frank E. Melton
Tuttle & Taylor Incorporated
609 South Grand Avenue
Los Angeles, California 90017

Bernard L. Allamano, Chief Counsel
Gary P. Reynolds, Assistant Chief Counsel
1108 "O" Street
Sacramento, California 95814

Jeffrey L. Gunther, Chief Counsel
Christine A. Bologna
Department of Personnel Administration
State of California
1115 11th Street
Sacramento, California 95814

John K. Van de Kamp, Attorney General
N. Eugene Hill, Assistant Attorney General
State of California
1515 "K" Street
Sacramento, California 95814

EDWIN VIEIRA, JR.
13877 Napa Drive
Manassas, Virginia 22110
(703) 791-6780

Counsel of Record for Amicus Curiae
Public Service Research Council

24 January 1985